advocate the release of the withheld documents."[223] It entirely neglected to explain, however, how such exacting specificity could be made public without jeopardizing disclosure of the very information being protected.[224] Following the Ninth Circuit, the Court of Appeals for the Third Circuit has, at least in one case, similarly rejected the FBI's coded Vaughn Index, even when supplemented by actual testimony of the declarant.[225]

Although an agency ordinarily must justify its withholdings on a page-by-page or document-by-document basis, under certain circumstances courts have approved withholdings of entire, but discrete, categories of records which encompass similar information.[226] Most commonly, courts have permitted the withholding of records under Exemption 7(A) on a category-by-category or "generic" basis.[227] While the outermost contours of what constitutes an ac

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[223] Id. at 979; see Church of Scientology, 30 F.3d at 228, 231; see also United States Dep't of Justice v. Landano, 508 U.S. 165, 180 (1993).

[224] Cf. Simon v. United States Dep't of Justice, 980 F.2d 782, 784 (D.C. Cir. 1992) (rejecting appellant's Wiener-based argument and holding that despite inadequacy of Vaughn Index, in camera review--"although admittedly imperfect for the reason the appellant states--is the best way to assure both that the agency is entitled to the exemption it claims and that the confidential source is protected").

[225] See Davin, 60 F.3d at 1050-51.

[226] See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24 (1978) (language of Exemption 7(A) "appears to contemplate that certain generic determinations may be made"); Crooker v. ATF, 789 F.2d 64, 66-67 (D.C. Cir. 1986) (distinguishing between unacceptable "blanket" exemptions and permissible generic determinations); Pully v. IRS, 939 F. Supp. 429, 433-38 (E.D. Va. 1996) (accepting categorization of 5,624 documents into 26 separate categories protected under several exemptions); see also Landano, 508 U.S. at 179 ("There may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred."); Reporters Comm., 489 U.S. at 776 ("categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction"); cf. Coleman v. FBI, No. 95-1516, 1997 U.S. Dist. LEXIS, at *11 (D.D.C. July 31, 1997) ("For an agency to break from the norm of a document-by-document index, the agency must at least argue that a `categorical' index is warranted.").

[227] See, e.g., Robbins Tire, 417 U.S. at 218-23 (endorsing government's position "that a particularized, case-by-case showing is neither required nor practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure [under Exemption 7(A)] while the hearing is pending"); In re Department of Justice, 999 F.2d 1302, 1309 (8th Cir. 1993) (en banc); Dickerson v. Department of Justice, 992 F.2d 1426, 1428-31 (6th Cir. 1993) (approving FBI justification of Exemption 7(A) for documents

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ceptable "generic" Exemption 7(A) Vaughn presentations are sometimes unclear,[228] it appears well established that if the agency has (1) defined its Exemption 7(A) categories functionally, (2) conducted a document-by-document review in order to assign documents to the proper category, and (3) explained how the release of each category of information would interfere with the enforcement proceedings, the description will be found sufficient.[229] (See dis

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[227](...continued)
pertaining to disappearance of Jimmy Hoffa on "category-by-document" basis by supplying "a general description of the contents of the investigatory files, categorizing the records by source or function"); Lewis, 823 F.2d at 389 ("The IRS need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings."); Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986); Western Journalism Ctr. v. Office of the Indep. Counsel, 926 F. Supp. 189, 192 (D.D.C. 1996) ("The Independent Counsel's declaration certainly satisfies Exemption 7(A) and the Independent Counsel `need not proceed on a document-by-document basis, detailing to the court the interference that would result from the disclosure of each of them'" (quoting Bevis, 801 F.2d at 1389)), summary affirmance granted, No. 96-5178, 1997 WL 195516, at *1 (D.C. Cir. Mar. 11, 1997) ("[A]ppellee was not required to describe the records retrieved in response to appellants' request, or the harm their disclosure might cause, on a document-by-document basis, as appellee's description of the information contained in the three categories it devised is sufficient to permit the court to determine whether the information retrieved is exempt from disclosure."); May v. IRS, No. 90-1123, slip op. at 5 (W.D. Mo. Dec. 9, 1991) ("Because the plaintiff's requests basically encompass all documents relating to his pending investigation, the documents in question fit into a genus that does not warrant a document-by-document review."); see also Citizens Comm'n, 45 F.3d at 1328 (for responsive records consisting of 1000 volumes of 300 to 400 pages each, volume-by-volume summary held adequate when Vaughn Indexes "specifically describe the documents' contents and give specific reasons for withholding them"); FOIA Update, Spring 1984, at 3-4.

[228] Compare Curran v. Department of Justice, 813 F.2d 473, 476 (1st Cir. 1987) (approving category entitled "other sundry items of information" because "[a]bsent a `miscellaneous' category of this sort, the FBI would, especially in the case of one-of-a-kind records, have to resort to just the sort of precise description which would itself compromise the exemption"), and May, No. 90-1123, slip op. at 6-7 (W.D. Mo. Dec. 9, 1991) (approving categories of "intra-agency memoranda" and "work sheets"), with Bevis, 801 F.2d at 1390 ("categories identified only as `teletypes,' or `airtels,' or `letters'" held inadequate).

[229] See In re Department of Justice, 999 F.2d at 1309 (citing Bevis, 801 F.2d at 1389-90); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 806 (D.N.J. 1993); see also Dickerson, 992 F.2d at 1433 (enumerating categories of information withheld); Curran, 813 F.2d at 476 (same); May, No. 90-1123, slip op. at 6-7 (W.D. Mo. Dec. 9, 1991) (same); Docal v. Bennsinger, 543 F. Supp. 38, 44 n.12 (M.D. Pa. 1981) (enumerating categories of "interference"); cf. Curran, 813 F.2d at 476 (stating that FBI affidavit met Bevis test and therefore find-
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cussion of Vaughn Indexes under Exemption 7(A), above.) Moreover, when "a claimed FOIA exemption consists of a generic [exemption], dependent upon the category of records rather than the subject matter which each individual record contains [so that] resort to a Vaughn index is futile,"[230] such generic descriptions can also satisfy an agency's Vaughn obligation with regard to other exemptions as well.[231]

It also should be noted that the "single document Vaughn index requirement" purportedly established in Founding Church of Scientology v. Bell,[232] is not followed as a practical matter, particularly when more than one agency is

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[229](...continued)
ing it unnecessary to determine whether Bevis test is too demanding).

[230] Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C. Cir. 1986).

[231] See Reporters Comm., 489 U.S. at 779-80 (authorizing "categorical" protection of information under Exemption 7(C)); Gallant, 26 F.3d at 173 (categorical withholding of names under Exemption 6 approved); Church of Scientology, 792 F.2d at 152 (generic exemption under IRS Exemption 3 statute, 26 U.S.C. § 6103 (1994), appropriate if "affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category"); Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983) (no index required in third-party request for records when agency categorically neither confirmed nor denied existence of records on particular individuals absent showing of public interest in disclosure); Brown, 658 F.2d at 74 (protecting personal information under Exemption 6); Pully, 939 F. Supp. at 433-38 (accepting categorical descriptions for documents protected under Exemptions 3 (in conjunction with 21 U.S.C. § 6103(a) (1994)), 5 (attorney-client privilege), 7(A), 7(C), and 7(E) when 5624 documents arranged into 26 categories); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 3-13 (D.D.C. Sept. 24, 1992) (categorical descriptions accepted for withholdings under Exemptions 3 (in conjunction with Rule 6(e) of Federal Rules of Criminal Procedure and 26 U.S.C. § 6103), 5, 7(A), 7(C), and 7(D)); MCI Telecomm. Corp. v. GSA, No. 89-0746, slip op. at 5-10 (D.D.C. Mar. 25, 1992) (Exemption 5 withholdings); May, No. 90-1123, slip op. at 9 (W.D. Mo. Dec. 9, 1991) (withholdings protected under both Exemption 7(A) and 26 U.S.C. § 6103); NTEU v. United States Customs Serv., 602 F. Supp. 469, 472-73 (D.D.C. 1984) (no index required for 44 employee-evaluation forms withheld under Exemption 2); see also Church of Scientology, 30 F.3d at 234 ("[A] categorical approach to nondisclosure is permissible only when the government can establish that, in every case, a particular type of information may be withheld regardless of the specific surrounding circumstances."); FOIA Update, Spring 1989, at 6. But see McNamera v. United States Dep't of Justice, 949 F. Supp. 478, 483 (W.D. Tex. 1996) (rejecting apparent categorical indices for request for criminal files on third parties claimed exempt under Exemptions 6 and 7(C) because "there is no way for the court to tell whether some, a portion of some, or all the documents being withheld fall within any of the exemptions claimed").

[232] 603 F.2d at 949.

involved in a suit.[233] Additionally, in certain circumstances a Vaughn affidavit which by itself would be inadequate to support withholding may be supplemented by in camera review of withheld material.[234] (See discussion under In Camera Inspection, below.)

In a broad range of contexts, most courts have refused to require agencies to file public Vaughn Indexes that are so detailed as to reveal sensitive information the withholding of which is the very issue in the litigation.[235] Therefore, in

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[233] See, e.g., Afshar v. Department of State, 702 F.2d 1125, 1144-45 (D.C. Cir. 1983) (more than one affidavit may be supplied); United States Student Ass'n, 620 F. Supp. at 567-68 (in request for voluminous documents, agency filed monthly indexes as documents were indexed).

[234] See, e.g., Maynard, 986 F.2d at 557 ("Where, as here, the agency, for good reason, does not furnish publicly the kind of detail required for a satisfactory Vaughn index, a district court may review the documents in camera."); King, 830 F.2d at 225; Williams, No. 90-2299, slip op. at 12 (D.D.C. Aug. 6, 1991); SafeCard, No. 84-3073, slip op. at 12 n.7 (D.D.C. May 19, 1988); Struth v. FBI, 673 F. Supp. 949, 956 (E.D. Wis. 1987); see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988) ("[W]here a trial court properly reviewed contested documents in camera, an adequate factual basis for the decision exists."). But see Wiener, 943 F.2d at 979 ("In camera review of the withheld documents by the [district] court is not an acceptable substitute for an adequate Vaughn index.").

[235] See, e.g., Landano, 508 U.S. at 180 ("To the extent that the Government's proof may compromise legitimate interests, of course, the Government still can attempt to meet its burden with in camera affidavits."); Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997) ("Indeed we doubt that the agency could have introduced further proof without revealing the actual contents of the withheld materials."); Oglesby, 79 F.3d at 1176 ("The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document without actually disclosing information that deserves protection."); Patterson, 56 F.3d at 837 ("[W]e do not wish to force the government to disclose so much information about the investigation or the particular documents that an exemption loses its intended effect."); Maynard, 986 F.2d at 557 (although public declaration "lacked specifics, a more detailed affidavit could have revealed the very intelligence sources or methods that the CIA wished to keep secret"); Lewis, 823 F.2d at 380 ("[A] Vaughn index of the documents here would defeat the purpose of Exemption 7(A). It would aid [the requester] in discovering the exact nature of the documents supporting the government's case against him earlier than he otherwise would or should."); Curran, 813 F.2d at 476 (agency should not be forced "to resort to just the sort of precise description which would itself compromise the exemption"); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1980) ("the government need not specify its objections in such detail as to compromise the secrecy of the information"); Manna, 815 F. Supp. at 817 ("[P]laintiff's request for a Vaughn index must be denied because submission of a

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camera affidavits are frequently utilized in Exemption 1 cases, as is discussed below, when a public description of responsive documents would compromise national security.[236] This same important principle has been applied to other FOIA exemptions--for example, in Exemption 5 cases,[237] in Exemption 7(A) cases,[238] and in Exemption 7(D) cases[239]--as well. However, in all cases in which explanations for withholding are presented in camera, the agency is obliged to ensure that it has first set forth on the public record an explanation that is as complete as possible without compromising the sensitive information.[240]

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[235](...continued)
detailed Vaughn index may present the same risks that production of the underlying documents presents."). But see Wiener, 943 F.2d at 977-87.

[236] See, e.g., Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983); Public Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995); Keys v. United States Dep't of Justice, No. 85-2588, slip op. at 3 (D.D.C. May 12, 1986), aff'd on other grounds, 830 F.2d at 337; see also CIA v. Sims, 471 U.S. 159, 179 (1985) ("the mere explanation of why information must be withheld can convey [harmful] information").

[237] See, e.g., Ethyl Corp. v. EPA, 25 F.3d 1241, 1250 (4th Cir. 1994) ("If the district court is satisfied that the EPA cannot describe documents in more detail without breaching a properly asserted confidentiality, then the court is still left with the mechanism provided by the statute--to conduct an in camera review of the documents."); Wolfe v. HHS, 839 F.2d 768, 771 n.3 (D.C. Cir. 1988) (en banc) ("Where the index itself would reveal significant aspects of the deliberative process, this court has not hesitated to limit consideration of the Vaughn index to in camera inspection.").

[238] See, e.g., Alyeska Pipeline Serv. v. EPA, No. 86-2176, slip op. at 8 (D.D.C. Sept. 9, 1987) ("[R]equiring a Vaughn index in this matter will result in exactly the kind of harm to defendant's law enforcement proceedings which it is trying to avoid under exemption 7(A)."), aff'd on other grounds, 856 F.2d 309 (D.C. Cir. 1988); Dickerson v. Department of Justice, No. 90-60045, slip op. at 4-5 (E.D. Mich. July 31, 1991), aff'd, 992 F.2d 1426 (6th Cir. 1993).

[239] See, e.g., Landano, 508 U.S. at 180 (government can meet its burden with in camera affidavits in order to avoid identification of sources in Exemption 7(D) withholdings); Church of Scientology, 30 F.3d at 240 n.23 (same); Keys, 830 F.2d at 349 (no requirement to produce Vaughn Index in "degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold"); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 21 (D.D.C. 1992) ("[A] meaningful description beyond that provided by the Vaughn code utilized in this case would probably lead to disclosure of the identity of sources.").

[240] See Armstrong v. Executive Office of the President, 97 F.3d 575, 580-81 (D.C. Cir. 1996) (citing Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1465 (D.C. Cir. 1984)); Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

LITIGATION CONSIDERATIONS

With regard to the timing of the creation of a Vaughn Index, it is well settled that a requester is not entitled to a Vaughn Index during the administrative process.[241] Furthermore, courts generally do not require the submission of a Vaughn Index prior to the time at which a dispositive motion is filed. This standard practice is based upon the need to maintain an orderly and efficient adjudicative process in FOIA cases, and upon the practical reality that some form of affidavit, declaration, or index virtually always accompanies the defendant agency's motion for summary judgment.[242] Efforts to compel the preparation of Vaughn Indexes prior to the filing of an agency's dispositive motion are typically denied as premature.[243]

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[241] See, e.g., Schaake v. IRS, No. 91-958, slip op. at 7-8 (S.D. Ill. June 3, 1992); SafeCard, No. 84-3073, slip op. at 3-5 (D.D.C. May 19, 1988); see also FOIA Update, Summer 1986, at 6; cf. Judicial Watch, 880 F. Supp. at 11.

[242] See, e.g., Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 1 (D.D.C. Aug. 20, 1987) (standard practice is to await filing of agency's dispositive motion before deciding whether additional indexes will be necessary); British Airports Auth. v. CAB, 2 Gov't Disclosure Serv. (P-H) ¶ 81,234, at 81,654 (D.D.C. June 25, 1981) ("standard practice which has developed is for the Court to commit the parties to a schedule for briefing summary judgment motions," with "defendant typically fil[ing] first and simultaneously with or in advance of filing submit[ting] supporting affidavits and indices").

[243] See, e.g., Miscavige, 2 F.3d at 369 ("The plaintiff's early attempt in litigation of this kind to obtain a Vaughn Index . . . is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Frankenberry v. United States Dep't of Justice, No. 87-3284, slip op. at 2 (D.D.C. Feb. 23, 1988) (motion to compel submission of Vaughn Index prior to summary judgment motion denied as premature); Covington & Burling v. Farm Credit Admin., No. 87-2017, slip op. at 1 (D.D.C. Oct. 23, 1987) (whether case warrants Vaughn Index is "question of fact that can only be determined" after dispositive motion is filed); Stimac v. United States Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) (motion to compel Vaughn Index denied as premature on ground that "filing of a dispositive motion, along with detailed affidavits, may obviate the need for indexing the withheld documents"); see also Cohen v. FBI, 831 F. Supp. 850, 855 (S.D. Fla. 1993) (Vaughn Index not required when "Open America" stay granted; as no documents have been processed, no exemptions have been claimed); Government Accountability Project v. NRC, No. 87-2053, slip op. at 1 (D.D.C. Aug. 13, 1987) ("[U]ntil defendant files an answer this Court is unable to determine precisely what will be contested and whether a Vaughn Index is appropriate and proper."). But see, e.g., Rosenfeld v. United States Dep't of Justice, No. C-90-3576, slip op. at 18-19 (N.D. Cal. Feb. 18, 1992) (There is no "indication that the provision of material justifying claimed exemptions should be delayed until a dispositive motion has been filed by the government."); Providence Journal Co. v. United States Dep't of the Army, 769 F. Supp. 67, 69 (D.R.I. 1991) (contention that Vaughn Index must await dispositive motion found to be "insufficient and sterile" when agency "has not even indicated when it plans to file such a

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In Camera Inspection

In camera examination of documents is specifically authorized in the statutory language of the FOIA,[244] but it certainly is the exception and not the rule.[245] Indeed, in cases involving national security, the Court of Appeals for the District of Columbia Circuit has cautioned that "a district court exercises a wise discretion when it limits the number of documents it reviews in camera."[246]

When an agency meets its burden by means of sufficiently detailed affidavits, in camera review may be deemed unnecessary and inappropriate.[247] It has

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[243](...continued)
motion").

[244] 5 U.S.C. § 552(a)(4)(B) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997); see S. Conf. Rep. 93-1200, at 9 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6287.

[245] See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) (in camera review provision "is designed to be invoked when the issue before the District Court could not be otherwise resolved"); PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993) (in camera review generally disfavored, but permissible on remand arising from inadequate affidavit); Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (in camera review, "though permitted under FOIA and sometimes necessary, is generally disfavored"); Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984) (in camera examination is not substitute for government's obligation to provide detailed indexes and justifications); Manna v. United States Dep't of Justice, 832 F. Supp. 866, 873 (D.N.J. 1993) (in camera review is generally disfavored); Cooley v. Department of the Navy, No. 85-1045, slip op. at 4 (D.D.C. Dec. 30, 1985) ("Considerations other than efficiency alone must dictate whether the judge should undertake an in camera inspection.").

[246] Armstrong v. Executive Office of the President, 97 F.3d 575, 580 (D.C. Cir. 1996) ("First, [limited in camera review] makes it less likely that sensitive information will be disclosed. Second, if there is an unauthorized disclosure, having reduced the number of people with access to the information makes it easier to pinpoint the source of the leak.").

[247] See, e.g., Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992); Silets v. United States Dep't of Justice, 945 F.2d 227, 229-32 (7th Cir. 1991) (en banc); Vaughn v. United States, 936 F.2d 862, 869 (6th Cir. 1991) (in camera review "neither favored nor necessary where other evidence provides adequate detail and justification"); Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988); Brinton v. Department of State, 636 F.2d 600, 606 (D.C. Cir. 1980); Frydman v. Department of Justice, 852 F. Supp. 1497, 1508 (D. Kan. 1994), aff'd, 57 F.3d 1080 (10th Cir. 1995) (unpublished table decision); Canning v. United States Dep't of Justice, 848 F. Supp. 1037, 1049 (D.D.C. 1994); Cappabianca v. Commissioner, United States Customs Serv., 847 F. Supp. 1558, 1562 (M.D. Fla.
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been held that: "in camera review may be particularly appropriate when either the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims, or there is evidence of bad faith on the part of the agency."[248] Most appellate courts have applied the same, or a very similar, standard for evaluating the necessity of in camera submissions.[249] In a unique case, the Court of Appeals for the Sixth Circuit has recently added that even with the submission of adequately detailed affidavits--and in the absence of any bad faith in the agency's FOIA processing--in camera inspection should also be undertaken when there may be "evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue" in order to reassure the plaintiff and the public that justice has been served.[250]

It has been repeatedly recognized that "[t]he decision to conduct an in camera review is committed to the `"broad discretion of the trial court judge."'"[251] Thus, at the court's discretion, in camera examination can be ordered even if a Vaughn Index is filed.[252] This may occur when the record in the case is too vague

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[247](...continued)
1994).

[248] Quiñon v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (citing Lam Lek Chong v. DEA, 929 F.2d 729, 735 (D.C. Cir. 1991) (citing, in turn, Carter v. United States Dep't of Commerce, 830 F.2d 388, 392 (D.C. Cir. 1987))); see, e.g., Dow Jones & Co. v. FBI, No. 85-0097, slip op. at 6-7 (D.D.C. Jan. 5, 1988) (in camera inspection ordered following submission of agency's second inadequate affidavit); cf. Silets, 945 F.2d at 231 (mere assertion, as opposed to actual evidence, of bad faith on part of agency found insufficient to warrant court's in camera review).

[249] See Silets, 945 F.2d at 229 (collecting cases).

[250] Jones v. FBI, 41 F.3d 238, 243 (6th Cir. 1994) (reviewing documents compiled as part of FBI's widely criticized COINTELPRO operations during 1960's and 1970's).

[251] Quiñon, 86 F.3d at 1227 (quoting Lam Lek Chong, 929 F.2d at 735 (quoting, in turn, Carter, 830 F.2d at 392)); see, e.g., Armstrong, 97 F.3d at 579 (district court did not abuse its discretion where it undertook in camera review of one document, but not of another (similarly characterized) document); Robbins Tire, 437 U.S. at 224 ("[t]he in camera review provision is discretionary by its terms"); Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993) (in camera review "is discretionary and not required, absent an abuse of discretion"); Ingle v. Department of Justice, 698 F.2d 259, 266 (6th Cir. 1983).

[252] See, e.g., In re Department of Justice, 999 F.2d 1302, 1310 (8th Cir. 1993) (en banc) ("If the [Vaughn Index] categories remain too general, the district court may also examine the disputed documents in camera to make a first hand determination."). But see J.P. Stevens & Co. v. Perry, 710 F.2d 136, 142 (4th Cir. 1983) (district court's in camera inspection held to be error when Exemption 7(A) Vaughn affidavit was sufficient to show "interference" category-by-category);
(continued...)

or the agency's claims of exemption are too sweeping.[253] In camera inspection has been ordered also in cases in which the plaintiff has alleged that the government has waived its right to claim an exemption.[254] However, an agency should first have an opportunity to submit its public affidavit.[255] Nevertheless, by conducting in camera inspection, a district court necessarily establishes an adequate factual basis for determining the applicability of the claimed exemptions, regardless of the adequacy of an agency's affidavit.[256]

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[252](...continued)
Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 87-88 (2d Cir. 1979) (in camera inspection order found to be abuse of discretion); Norwood v. FAA, No. 83-2315, slip op. at 15-16 (W.D. Tenn. Dec. 11, 1991) (proffered in camera inspection rejected when "extensive declarations submitted . . . provide sufficient information to enable the Court to rule on the application of the asserted FOIA exemptions"), aff'd in part & rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993).

[253] Quiñon, 86 F.3d at 1229 ("[W]here an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure, an in camera review is necessary."); King v. United States Dep't of Justice, 830 F.2d 210, 225 (D.C. Cir. 1987); see, e.g., Weissman v. CIA, 565 F.2d 692, 697-98 (D.C. Cir. 1977); Miscavige v. IRS, No. CV-91-3721, slip op. at 8-9 (C.D. Cal. Dec. 9, 1992); Dow Jones, No. 85-0097, slip op. at 6-7 (D.D.C. Jan. 5, 1988); Struth v. FBI, 673 F. Supp. 949, 956 (E.D. Wis. 1987).

[254] See Public Citizen v. United States Dep't of State, 787 F. Supp. 12, 13 (D.D.C. 1992), aff'd, 11 F.3d 1198 (D.C. Cir. 1993).

[255] See Ingle, 698 F.2d at 264 ("`In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that "it can't hurt."'" (quoting Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978))); Manna, 832 F. Supp. at 847 (government should be permitted to submit more detailed Vaughn explanation before court resorts to in camera review); Hoch v. CIA, 593 F. Supp. 675, 680 (D.D.C. 1984) ("In camera proceedings are a last resort . . . particularly in national security situations."), aff'd, 907 F.2d 1227 (D.C. Cir. 1990) (unpublished table decision); Schlesinger v. CIA, 591 F. Supp. 60, 67-68 (D.D.C. 1984) (selective in camera review undertaken in Exemption 1 case to determine whether classification and agency justifications for withholding were proper when public disclosure would compromise national security); see also Meeropol v. Meese, 790 F.2d 942, 958-59 (D.C. Cir. 1986) (upholding district court decision to sample only one percent of voluminous documents).

[256] See National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988); see also City of Va. Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993) ("By conducting in camera review, the district court established an adequate basis for its decision."). But see Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) ("In camera review of the withheld documents by the court is not an acceptable substitute for an adequate Vaughn index.").

LITIGATION CONSIDERATIONS

Although there is no per se rule requiring in camera inspection,[257] it has been found to be appropriate when only a small volume of records is involved,[258] and when it is the only method by which the district court could properly review a privacy claim under Exemption 6.[259] Similarly, when a discrepancy exists between representations in the Vaughn Index and other information that the agency has publicly disclosed regarding the withheld records, in camera inspection has been held to be an appropriate method by which to resolve that inconsistency.[260] Additionally, an in camera description of a sample of a larger number of documents has been found appropriate when national security concerns make detailed, public affidavits impracticable.[261] (For a further discussion of in camera review of classified materials, see Exemption 1, In Camera Submissions, above.) On the other hand, it has been held that in camera review is not a procedure to be employed as a means of determining whether a requester should be charged duplication fees.[262]

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[257] See Young, 972 F.2d at 539 ("this rule would eviscerate the discretion Congress gave district courts in section 552(a)(4)(B)"); Vaughn, 936 F.2d at 868-69; Center for Auto Safety v. EPA, 731 F.2d 16, 20 (D.C. Cir. 1984) (in camera inspection not required under Exemption 5).

[258] See Quiñon, 86 F.3d at 1228; Maynard v. CIA, 986 F.2d 547, 558 (1st Cir. 1993); Carter, 830 F.2d at 393; Currie v. IRS, 704 F.2d 523, 531 (11th Cir. 1983); Allen v. CIA, 636 F.2d 1287, 1291-92 (D.C. Cir. 1980); Simon v. United States Dep't of Justice, No. 89-2117, slip op. at 4 (D.D.C. Sept. 14, 1990); see also Agee v. CIA, 517 F. Supp. 1335, 1336 (D.D.C. 1981) (selective in camera review); cf. Young, 972 F.2d at 549 (rejecting per se rule which would require in camera review "whenever the examination could be completed quickly"); Landfair v. United States Dep't of the Army, No. 85-1421, slip op. at 9-10 (D.D.C. Mar. 27, 1986) (no in camera inspection necessary "irrespective of the number of documents involved" when affidavits appear adequate).

[259] See Public Citizen Health Research Group v. United States Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978); see also Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (in camera inspection of classified affidavit appropriate when "[d]isclosure of the details . . . might result in serious consequences to the nation's security").

[260] See Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992).

[261] See, e.g., Wilson v. CIA, No. 89-3356, slip op. at 5-6 (D.D.C. Oct. 15, 1991) (50-document sample of approximately 1000 pages withheld in whole or in part, selected equally by parties, for in camera explanation); Wilson v. Department of Justice, No. 87-2415, slip op. at 4 (D.D.C. June 13, 1991) (sample of eight of approximately 80 withheld documents, to be selected equally by each side, for detailed in camera description). But cf. Lame v. United States Dep't of Justice, 654 F.2d 917, 927 (3d Cir. 1981) (in camera sampling of criminal law enforcement documents held insufficient).

[262] See Larson v. United States Dep't of Justice, No. 85-2991, slip op. at 2 (D.D.C. Sept. 30, 1986).

Although an agency may also employ in camera declarations to explain the basis for its withholdings, such filings should be made only when clearly necessary.[263] A district court may properly review such affidavits only after it has first publicly explained its rationale for so doing and ensured that the agency has provided as complete a public explanation as possible without jeopardizing the sensitive, exempt information.[264] Additionally, in limited circumstances, in camera, ex parte oral testimony may be permitted, particularly in cases in which documents contain national security information, because providing a more informative public description of the documents would risk revealing the very information that the agency states is exempt from disclosure under the FOIA.[265] When in camera testimony is taken, however, it should be transcribed and maintained under seal.[266] But regardless of whether the court inspects documents or receives testimony, counsel for the plaintiff ordinarily is not entitled to participate in such in camera proceedings.[267]

Summary Judgment

Summary judgment is the procedural vehicle by which nearly all FOIA

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[263] See Armstrong, 97 F.3d at 580-81 ("[T]he use of in camera affidavits has generally been disfavored.").

[264] See id. (holding that District Court "must both make its reasons for [relying on an in camera declaration] clear and make as much as possible of the in camera submission available to the opposing party" (citing Lykins, 725 F.2d at 1465)); see also Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

[265] See, e.g., Stein v. Department of Justice, 662 F.2d 1245, 1255 (7th Cir. 1981); Agee, 517 F. Supp. at 1338; see also Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1469-71 (D.C. Cir. 1983); North Am. Man/Boy Love Ass'n v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,094, at 83,639 (S.D.N.Y. July 9, 1982), aff'd, 718 F.2d 1086 (2d Cir. 1983) (unpublished table decision).

[266] See Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983); Physicians for Soc. Responsibility v. United States Dep't of Justice, No. 85-0169, slip op. at 3-4 (D.D.C. Aug. 23, 1985); cf. Martin v. United States Dep't of Justice, No. 85-3091, slip op. at 3 (3d Cir. July 2, 1986) (nonexempt portion of in camera transcript ordered disclosed).

[267] See Arieff, 712 F.2d at 1470-71 & n.2 (no participation by plaintiff's counsel permitted even when information withheld was personal privacy information); Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) (plaintiff's counsel not permitted to participate in in camera review of documents arguably covered by state secrets privilege); Pollard, 705 F.2d at 1154 (no reversible error when court not only reviewed affidavit and documents in camera, but also received authenticating testimony ex parte); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); Weberman, 668 F.2d at 678; Hayden v. NSA, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979). But cf. Lederle Labs. v. HHS, No. 88-249, slip op. at 2-3 (D.D.C. May 2, 1988) (restrictive protective order granted in Exemption 4 case permitting counsel for requester to review contested business information).

cases are resolved.[268] Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which provides, in part, that the "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."[269] As long as there are no material facts at issue and no facts "susceptible to divergent inferences bearing upon an issue critical to disposition of the case," summary judgment is appropriate.[270] Of course, an agency's failure to respond to a FOIA request in a timely manner does not, by itself, justify an award of summary judgment to the requester.[271]

The Court of Appeals for the District of Columbia Circuit has held that "a motion for summary judgment adequately underpinned is not defeated simply by bare opinion or an unaided claim that a factual controversy persists."[272] In

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[268] See Cappabianca v. Commissioner, United States Customs Serv., 847 F. Supp. 1558, 1561 (M.D. Fla. 1994) ("once documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment" (citing Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993))); Manna v. United States Dep't of Justice, 832 F. Supp. 866, 870 (D.N.J. 1993) ("Summary judgment is typically used to adjudicate FOIA cases."); Struth v. FBI, 673 F. Supp. 949, 953 (E.D. Wis. 1987) ("Summary judgment is commonly used to adjudicate FOIA cases.").

[269] Fed. R. Civ. P. 56(c).

[270] Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 314 (D.C. Cir. 1988); see, e.g., Plazas-Martinez v. DEA, 891 F. Supp. 1, 3 (D.D.C. 1995) ("Plaintiff's submission does create a dispute on an issue of fact; it is not a material issue, however."); Kuffel v. United States Bureau of Prisons, 882 F. Supp. 1116, 1122 (D.D.C. 1995) (plaintiff's disagreement with application of exemptions held to not constitute a dispute as to material facts precluding summary judgment "because he does not put forth any facts to prove that they were wrongfully applied"); Patterson v. IRS, No. 90-1941, slip op. at 3 (S.D. Ind. Nov. 3, 1992) ("[T]he disputed fact must be outcome determinative."), aff'd in part, rev'd & remanded in part on other grounds, 56 F.3d 841 (7th Cir. 1995); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 3-4 (D.D.C. Sept. 29, 1987); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 409-11 (D.D.C. 1983).

[271] See Barvick v. Cisneros, 941 F. Supp. 1015, 1019-20 (D. Kan. 1996) ("This court is persuaded that an agency's failure to respond within [the statutory time limits] does not automatically entitle a FOIA requester to summary judgment.").

[272] Alyeska Pipeline, 856 F.2d at 314 (footnote omitted); see also Duckworth v. Department of Navy, No. 91-15921, slip op. at 2 (9th Cir. Sept. 10, 1992) ("`Conclusory allegations unsupported by factual data will not create a triable issue of fact.'" (quoting Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978))); Western Journalism Ctr. v. Office of the Indep. Counsel, 926 F. Supp.

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addition, "summary judgment need not be denied automatically in the face of non-substantive factual disputes, such as those that are . . . `metaphysical' in nature."[273] Nor will summary judgment necessarily be precluded by discrepancies in the agency's page counts, particularly when the agency has processed a voluminous number of pages, so long as the agency has supplied a "well-detailed and clear" explanation for the differences.[274] Moreover, even a pro se plaintiff will be found to have conceded the government's factual assertions if he fails to contest them, once it is clear that he understands his responsibility to do so.[275]

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[272](...continued)
189, 191 (D.D.C. 1996) ("Any factual assertions contained in affidavits and other evidence in support of the moving party's motion for summary judgment shall be accepted as true unless the facts are controverted by the non-moving party through affidavits or other documentary evidence."), summary affirmance granted, No. 96-5178, 1997 WL 195516, at *1 (D.C. Cir. Mar. 11, 1997); Gale v. FBI, 141 F.R.D. 94, 96 (N.D. Ill. 1992) (plaintiff's "own self-serving statements [alone] are insufficient to create a genuine issue of material fact barring summary judgment"); Lawyers Alliance for Nuclear Arms Control v. Department of Energy, No. 88-CV-7635, slip op. at 3-5 (E.D. Pa. Dec. 17, 1991) (plaintiff's reliance on "inadmissible hearsay" statements insufficient to preclude summary judgment when rebutted by government's "highly persuasive" sworn statements). But see Washington Post Co. v. HHS, 865 F.2d 320, 325-26 (D.C. Cir. 1989) (summary judgment found to be inappropriate, in Exemption 4 case, when affidavits conflicted on "critical factual issue" of whether government's information-gathering ability would be impaired by disclosure); Washington Post Co. v. United States Dep't of State, 840 F.2d 26, 29 (D.C. Cir. 1988) (summary judgment found to be inappropriate "when litigants quarrel over key factual premises"), vacated on petition for reh'g en banc, 898 F.2d 793 (D.C. Cir. 1989).

[273] Lombardo v. United States Dep't of Justice, No. 87-2652, slip op. at 2 (D.D.C. June 22, 1988); see In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992) ("speculation would not defeat the summary judgment motion"); Trenerry v. IRS, No. 90-C-444, slip op. at 3 (N.D. Okla. Jan. 7, 1992) ("plaintiff must do more than vituperatively hypothesize"), aff'd in pertinent part, rev'd in part & remanded in part sub nom. Trenerry v. Department of the Treasury, 986 F.2d 1430 (10th Cir. 1993) (unpublished table decision).

[274] Master v. FBI, 926 F. Supp. 193, 197-98 (D.D.C. 1996), summary affirmance granted, No. 96-5325, 1997 WL 369460, at *1 (D.C. Cir. June 2, 1997).

[275] See Knight v. FDA, No. 95-4097, 1997 WL 109971, at *1 (D. Kan. Feb. 11, 1997); Nuzzo v. FBI, No. 95-cv-1708, 1996 U.S. Dist. LEXIS 15594, at **8-9 (D.D.C. Oct. 8, 1996); Butler v. Department of the Air Force, 888 F. Supp. 174, 178-79 (D.D.C. 1995), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997); Augarten v. United States Dep't of Treasury, No. 93-2293, 1994 U.S. Dist. LEXIS 7320, at *1 & n.1 (D.D.C. May 22, 1995); Ferreira v. DEA, 874 F. Supp. 15, 17 (D.D.C. 1995); Hill v. Blevins, No. 3:CV-92-0859, slip op. at 5-6 (M.D. Pa. Apr. 12, 1993), aff'd, 19 F.3d 643 (3d Cir. 1994) (unpublished table decision); see also
(continued...)

LITIGATION CONSIDERATIONS

In a FOIA case, the agency has the burden of justifying nondisclosure,[276] and it must sustain its burden through the submission of detailed affidavits[277] which identify the documents at issue and explain why they fall under the claimed exemptions.[278] (A federal statute specifically permits unsworn declarations (i.e., without notarizations) to be utilized in all cases in which affidavits otherwise would be required.[279]) The widespread use of Vaughn Indexes, of course, means that affidavits, in the form of Vaughn Indexes, will nearly always be submitted in FOIA lawsuits, notwithstanding Rule 56's language making affidavits optional in general.

As one court has put it, "[s]ummary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester."[280] Summary judgment may be granted solely on the basis of agency affidavits if they are clear, specific, and reasonably detailed, if they describe the withheld information in a factual and nonconclusory manner, and if there is no contradictory evidence on the record or evidence of agency bad faith.[281] If all of

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[275](...continued)
Hart v. FBI, No. 94 C 6010, slip op. at 4 (N.D. Ill. Apr. 6, 1995) ("plaintiff has not asserted any facts which convince this Court that the FBI has any records which relate to him or has failed to conduct an adequate search"), aff'd, 1996 U.S. App. LEXIS 17684, at **8-9 (7th Cir. July 16, 1996); cf. Ruotolo v. IRS, 28 F.3d 6, 8-9 (2d Cir. 1994) (although plaintiffs were generally aware of summary judgment rules, district court should have specifically notified them of consequences of not complying with litigation deadlines before dismissing case).

[276] 5 U.S.C. § 552(a)(4)(B) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997); see, e.g., United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 789 (D.D.C. 1992).

[277] See, e.g., O'Harvey v. Office of Workers' Compensation Programs, No. 96-33015, 1997 WL 31589, at *1 (9th Cir. Jan. 21, 1997) (where district court relied on agency's denial letter "[w]ithout an affidavit or oral testimony, [it] lacked a factual basis to make its decision").

[278] See King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987); Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

[279] 28 U.S.C. § 1746 (1994); see Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993).

[280] Miller v. United States Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985).

[281] See, e.g., Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979); Barvick, (continued...)

these requisites are met, such affidavits are usually accorded substantial weight by the courts.[282]

However, in a controversial two-to-one panel opinion, the D.C. Circuit indicated that, at least in the Exemption 4 context, it would give great weight to the rebuttal evidence of the requester and therefore require particular specificity in the affidavit of a company that submitted information to the FDA that both the agency and the company argued was protectible pursuant to Exemption 4.[283] In the event of a trial on a contested issue of fact, it will be decided by a judge alone because a FOIA requester is "not entitled to a jury trial."[284]

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[281](...continued)
914 F. Supp. at 1018; Hemenway v. Hughes, 601 F. Supp. 1002, 1004 (D.D.C. 1985) (in FOIA cases, summary judgment does not hinge on existence of genuine issue of material fact, but rather on basis of agency affidavits if they are reasonably specific, demonstrate logical use of exemptions, and are not controverted by evidence in record or by bad faith) (applying standard developed in national security context to Exemption 6); see also In re Wade, 969 F.2d at 246 ("Without evidence of bad faith, the veracity of the government's submissions regarding reasons for withholding the documents should not be questioned."); cf. Kamman v. IRS, 56 F.3d 46, 49 (9th Cir. 1995) (finding agency failed to satisfy burden of proof and awarding summary judgment to plaintiff when agency affidavits "are nothing more than `conclusory and generalized allegations'"); Demma v. United States Dep't of Justice, No. 93 C 7296, 1995 WL 360731, at *3 (N.D. Ill. June 15, 1995) (summary judgment denied when affidavits addressed only one subject of plaintiff's multiple-subject request), appeal voluntarily dismissed, No. 96-1231 (7th Cir. June 12, 1996).

[282] See, e.g., Gardels v. CIA, 689 F.2d 1100, 1104 (D.C. Cir. 1982); Taylor v. Department of the Army, 684 F.2d 99, 106-07 (D.C. Cir. 1982); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 10 (D.D.C. 1995), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996).

[283] Greenberg v. FDA, 803 F.2d 1213, 1217-18 (D.C. Cir. 1986) (plaintiff "introduced evidence that placed material issues of fact in dispute"); see also Washington Post, 865 F.2d at 325-26 ("competing experts' affidavits as to the effect of disclosure" held to constitute "genuinely controverted factual issue" under Exemption 4); Public Citizen Health Research Group v. FDA, 953 F. Supp. 400, 403 (D.D.C. 1996) (same); MCI Telecomm. Corp. v. GSA, No. 89-746, slip op. at 15-16 (D.D.C. Mar. 25, 1992) ("fact-intensive question" under Exemption 4 as to whether disclosure will cause submitter competitive harm precludes summary judgment).

[284] Clarkson v. IRS, No. 8:88-3036, slip op. at 8 (D.S.C. May 10, 1990); see also Spurlock v. FBI, 69 F.3d 1010, 1013 (9th Cir. 1995) (noting district court "bench trial" on issue of propriety of exemption claims); Public Citizen, 953 F. Supp. at 403 (in face of conflicting affidavits, denying summary judgment and ordering bench trial on issue of whether disclosure would cause substantial competitive harm to submitter).

LITIGATION CONSIDERATIONS

In certain circumstances, opinions or conclusions may be asserted in agency affidavits, especially in cases in which disclosure would compromise national security.[285] On the other hand, "[c]ourts have consistently held that a requester's opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the agency when the agency possessing the relevant expertise has provided sufficiently detailed affidavits."[286]

Rule 56(e) of the Federal Rules of Civil Procedure provides that the affidavit must be based upon the personal knowledge of the affiant, must demonstrate the affiant's competency to testify as to matters stated, and must set forth only facts which would be admissible in evidence. "Gratuitous recitations of the affiant's own interpretation of the law," however, are inappropriate.[287]

In FOIA cases, the affidavit (or declaration) of an agency official who is knowledgeable about the way in which information is processed satisfies the personal knowledge requirement.[288] Similarly, in instances in which an agen

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[285] See Gardels, 689 F.2d at 1106 (there is "necessarily a region for forecasts in which informed judgment as to potential harm should be respected"); Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980) ("courts must take into account . . . that any affidavit of threatened harm to national security will always be speculative"); Hoch v. CIA, 593 F. Supp. 675, 683-84 (D.D.C. 1984), aff'd, 807 F.2d 1227 (D.C. Cir. 1990) (unpublished table decision); see also Moore v. FBI, No. 83-1541, slip op. at 2 (D.D.C. Aug. 30, 1984) ("particular incident" sufficiently identified given national security nature of documents), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision).

[286] Struth, 673 F. Supp. at 954; see, e.g., Goldberg v. United States Dep't of State, 818 F.2d 71, 78-79 (D.C. Cir. 1987) (Exemption 1); Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1289 (4th Cir. 1987) (Exemption 7(A)); Curran v. Department of Justice, 813 F.2d 473, 477 (1st Cir. 1987) (Exemption 7(A)); Gardels, 689 F.2d at 1106 n.5 (Exemptions 1 and 3); Windels, 576 F. Supp. at 410-11 (Exemptions 2 and 7(E)); see also Lindsey v. NSC, No. 84-3897, slip op. at 3 (D.D.C. July 12, 1985) (plaintiff cannot defeat summary judgment by saying that he will raise genuine issue "at a time of his own choosing").

[287] Alamo Aircraft Supply, Inc. v. Weinberger, No. 85-1291, slip op. at 3 (D.D.C. Feb. 21, 1986).

[288] See, e.g., Spannaus, 813 F.2d at 1289 (declarant's attestation "to his personal knowledge of the procedures used in handling [the] request and his familiarity with the documents in question" held sufficient); Cucci v. DEA, 871 F. Supp. 508, 513 (D.D.C. 1994) (declarant "had the requisite personal knowledge based on her examination of the records and her discussion with a representative of the [state police]" to attest that information was provided with express understanding of confidentiality); Coleman v. FBI, No. 89-2773, slip op. at 8-9 (D.D.C. Dec. 10, 1991) ("The law does not require the affiant preparing a Vaughn Index to be personally familiar with more than the procedures used in processing the particular request."), summary affirmance granted, No. 92-5040

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cy's search is questioned, an affidavit of an agency employee responsible for coordinating the search efforts is sufficient to fulfill the personal knowledge requirement.[289] Likewise, in justifying the withholding of classified information under Exemption 1, the affiant is required only to possess document-classification authority for the records in question, not personal knowledge of the particular substantive area that is the subject of the request.[290] However, affiants must establish that they are personally familiar with all of the withheld records,[291] and

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[288](...continued)
(D.C. Cir. Dec. 4, 1992); United States Student Ass'n v. CIA, 620 F. Supp. 565, 567-68 (D.D.C. 1985); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 55-56 (D.D.C. 1983) (affiant competent when observations based on review of investigative report and upon general familiarity with the nature of investigations similar to that documented in requested report), aff'd, 772 F.2d 919 (D.C. Cir. 1984); Founding Church of Scientology v. Levi, 579 F. Supp. 1060, 1064 (D.D.C. 1982); Ramo v. Department of the Navy, 487 F. Supp. 127, 130 (N.D. Cal. 1979), aff'd, 692 F.2d 765 (9th Cir. 1982) (unpublished table decision).

[289] See, e.g., Carney v. United States Dep't of Justice, 19 F.3d 807, 814 (2d Cir. 1994), aff'g in pertinent part, rev'g & remanding in part, No. 92-CV-6204, slip op. at 12 (W.D.N.Y. Apr. 27, 1993) ("There is no basis in either the statute or the relevant caselaw to require that an agency effectively establish by a series of sworn affidavits a `chain of custody' over its search process. The format of the proof submitted by defendant--declarations of supervisory employees, signed under penalty of perjury--is sufficient for purposes of both the statute and Fed.R.Civ.P. 56."); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); SafeCard Servs. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (employee "in charge of coordinating the [agency's] search and recovery efforts [is] most appropriate person to provide a comprehensive affidavit"); Meeropol v. Meese, 790 F.2d 942, 951 (D.C. Cir. 1986) (supervisor/affiant properly relied on information provided by agency personnel who actually performed search); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (when third party claimed to have knowledge of additional documents, affidavit of agency employee who contacted that party found sufficient); Pennsylvania Dep't of Pub. Welfare v. HHS, No. 84-690, slip op. at 3-4 (M.D. Pa. Nov. 10, 1985) (affidavits of supervisory officials who directed search held adequate); cf. Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (while agency employee with "firsthand knowledge" of relevant files was appropriate person to supervise search undertaken by contractor, affidavit must specifically describe search).

[290] See Holland v. CIA, No. 91-1233, slip op. at 15-16 (D.D.C. Aug. 31, 1992); McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 8-9 (D.D.C. Dec. 3, 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

[291] See Kamman, 56 F.3d at 49 (rejecting affidavit which revealed that signer (continued...)

should not be selected merely because they occupy a particular position in the agency.[292]

Discovery

Discovery is greatly restricted in FOIA actions.[293] It is generally limited to the scope of an agency's search,[294] its indexing and classification procedures, and similar factual matters.[295] Discovery may also be appropriate when the plaintiff

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[291](...continued)
"did not even review the actual documents at issue" and which attested only "that the documents are in a file that is marked with the name of a taxpayer other than [plaintiff]"); Sellar v. FBI, No. 84-1611, slip op. at 3 (D.D.C. July 22, 1988).

[292] See Timken Co. v. United States Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,975 n.9 (D.D.C. June 24, 1983) (affiant merely sampled documents that staff had reviewed for him).

[293] See Katzman v. Freeh, 926 F. Supp. 316, 319 (E.D.N.Y. 1996) ("discovery in a FOIA action is extremely limited"); Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 3 (D.D.C. Mar. 2, 1993) ("In the context of FOIA cases, discovery is generally inappropriate."); Williams v. FBI, No. 90-2299, slip op. at 8 (D.D.C. Aug. 6, 1991) ("[d]iscovery in FOIA cases is extremely limited"); see also In re Shackelford, No. 93-25, slip op. at 1 (D.D.C. Feb. 19. 1993) ("plaintiff's effort to depose two former FBI agents, now retired, concerning the purpose and conduct of the investigation of John Lennon over 20 years ago, is beyond the scope of allowable discovery in a [FOIA] action").

[294] See Ruotolo v. Department of Justice, 53 F.3d 4, 11 (2d Cir. 1995) (discovery on scope of burden that search would entail should have been granted); Weisberg v. United States Dep't of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980) (discovery appropriate to inquire into adequacy of document search); Exxon Corp. v. FTC, 384 F. Supp. 755, 760 (D.D.C. 1974) (discovery limited to adequacy of search for identifiable records).

[295] See Katzman, 926 F. Supp. at 319-20; Church of Scientology v. IRS, 137 F.R.D. 201, 202 (D. Mass. 1991); Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980); see also Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994) ("In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.") (citations omitted); Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 1-2 (D.D.C. Aug. 2, 1990) (permitting discovery, in Exemption 7(B) case, on issue of whether it is more probable than not that disclosure would seriously interfere with fairness of pending or "truly imminent" trial or adjudication); Silverberg v. HHS, No. 89-2743, slip op. at 2-3 (D.D.C. June 26, 1990) (permitting discovery, in Exemption 4 case, of responses by private drug-testing laboratories to agency's inquiry
(continued...)

can raise sufficient question as to the agency's good faith in processing or in its search.[296] Even so, however, it is the plaintiff's obligation to adequately explain "why, at that point in time, it cannot present by affidavit facts needed to defeat the [agency's] motion."[297] Moreover, in all cases, determinations of whether discovery should be permitted--and, if so, the type and extent of such discovery--are vested in the sound discretion of the district court.[298]

Such factual issues can properly arise, if at all, only after the government moves for summary judgment and submits its supporting affidavits and memo-

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[295](...continued)
concerning whether their "performance test results" are customarily released to public); ABC v. USIA, 599 F. Supp. 765, 768-70 (D.D.C. 1984) (agency head ordered to submit to deposition on issue of whether transcripts of tape-recorded telephone calls constitute "personal records" or "agency records"); cf. United States v. Owens, 54 F.3d 271, 277 (6th Cir. 1995) (allowing discovery on issue of ownership of joint state/federal
task force records in action by United States to enjoin state court disclosure order under state public records law). But see Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (discovery may be permitted to determine whether complete disclosure was made and whether exemptions properly applied).

[296] See, e.g., Armstrong v. Bush, 139 F.R.D. 547, 553 (D.D.C. 1991) (discovery permitted to test government's claim that request for electronically stored records "would place an unreasonable burden on the agency"); Van Strum v. EPA, 680 F. Supp. 349, 350-51 (D. Or. 1987) (discovery appropriate where documents received by anonymous source raise "valid concerns" of affiant's credibility and good faith of search); cf. Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (discovery unwarranted when court convinced that agency "has acted in good faith and has properly withheld responsive material"; fact that agency destroyed documents prior to receipt of FOIA request does not evidence lack of "good faith").

[297] Code v. FBI, No. 94-1892, 1997 WL 150070, at *8 (D.D.C. Mar. 26, 1997) (citing Strang v. United States Arms Control & Disarmament Agency, 864 F.2d 859, 861 (D.C. Cir. 1989)); accord Fed. R. Civ. P. 56(f).

[298] See North Carolina Network for Animals, Inc. v. USDA, No. 90-1443, slip op. at 12 (4th Cir. Feb. 5, 1991) ("The district court should exercise its discretion to limit discovery in this as in all FOIA cases, and may enter summary judgment on the basis of agency affidavits when they are sufficient to resolve issues . . . ."); see, e.g., Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993); Gillin v. IRS, 980 F.2d 819, 823 (1st Cir. 1992) (per curiam); Nolan v. United States Dep't of Justice, 973 F.2d 843, 849 (10th Cir. 1992); Meeropol v. Meese, 790 F.2d 942, 960-61 (D.C. Cir. 1986); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978); see also Anderson v. HHS, 80 F.3d 1500, 1507 (10th Cir. 1996) (district court did not abuse its discretion in denying plaintiff discovery on attorney fees issue).

randum of law.[299] For example, one court entered a protective order barring discovery until the defendant had an opportunity to submit a second Vaughn affidavit, even after the court had found that the agency's affidavit was insufficient to establish the adequacy of the agency's search.[300] At least one court has afforded a higher standard for Exemption 1 cases, stating the "[i]t would be inappropriate to open this up to inadvertent statements by . . . a deponent in a national security area."[301] In any event, the "trial court has broad discretion . . . to stay discovery until preliminary questions that may dispose of the case are determined."[302]

A FOIA plaintiff should not in any case be permitted to extend his discovery efforts into the agency's thought processes for claiming particular exemp-

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[299] See, e.g., Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("The plaintiff's early attempt in litigation of this kind . . . to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Farese v. United States Dep't of Justice, No. 86-5528, slip op. at 6 (D.C. Cir. Aug. 12, 1987) (affirming denial of discovery filed prior to affidavits because discovery "sought to short-circuit the agencies' review of the voluminous amount of documentation requested"); Simmons v. United States Dep't of Justice, 796 F.2d 709, 711-12 (4th Cir. 1986); Military Audit Project v. Casey, 656 F.2d 724, 750 (D.C. Cir. 1981); Church of Scientology, 137 F.R.D. at 202; Stone v. FBI, No. 87-1346, slip op. at 2 (D.D.C. Jan. 19, 1988); Ferri v. Department of Justice, No. 86-1279, slip op. at 2 (D.D.C. Oct. 3, 1986); Citizens for Envtl. Quality, Inc. v. USDA, No. 83-3763, slip op. at 2 (D.D.C. May 24, 1984), summary judgment granted, 602 F. Supp. 534 (D.D.C. 1984); Murphy, 490 F. Supp. at 1137; Diamond v. FBI, 487 F. Supp. 774, 777-78 (S.D.N.Y. 1979), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983).

[300] See Founding Church of Scientology v. United States Marshals Serv., 516 F. Supp. 151, 156 (D.D.C. 1980). But see Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 2 (D.D.C. July 27, 1988) (permitting discovery on issue of due diligence even prior to filing of government's affidavits); Shurberg Broad. v. FCC, 617 F. Supp. 825, 832 (D.D.C. 1985) (permitting discovery after receiving Vaughn affidavit and determining that there was genuine issue as to thoroughness of agency's search); Exxon Corp. v. FTC, 384 F. Supp. 755, 758-60 (D.D.C. 1974) (permitting discovery by interrogatories when affidavits raised questions regarding adequacy of search, but denying further discovery after answers to interrogatories, together with entire record in case, resolved such questions), remanded, 527 F.2d 1386 (D.C. Cir. 1976) (unpublished table decision).

[301] McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 8 (D.D.C. Dec. 3, 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987) (unpublished table decision).

[302] Petrus v. Brown, 833 F.2d 581, 583 (5th Cir. 1987) (granting stay of discovery pending determination of proper party defendant).

tions.[303] Moreover, discovery should not be permitted when a plaintiff seeks thereby to obtain the contents of withheld documents, the issue that lies at the very heart of a FOIA case.[304] Nevertheless, in one Exemption 4 case the court permitted the plaintiff's counsel to review an in camera submission, subject to the terms of a restrictive protective order.[305]

Discovery also should not be permitted when the plaintiff is plainly using the FOIA lawsuit as a means of questioning investigatory action taken by the agency or the underlying reasons for undertaking such investigations.[306] Courts will refuse to "allow [a] plaintiff to use this limited discovery opportunity as a fishing expedition [for] investigating matters related to separate lawsuits."[307]

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[303] See Ajluni v. FBI, 947 F. Supp. 599, 608 (N.D.N.Y. 1996); Pearson v. ATF, No. 85-3079, slip op. at 1-2 (D.D.C. Sept. 22, 1986); Murphy, 490 F. Supp. at 1136 (citing United States v. Morgan, 313 U.S. 409, 422 (1941)).

[304] See, e.g., Local 3, 845 F.2d at 1179 (plaintiff not entitled to discovery which would be tantamount to disclosure of contents of exempt documents); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (discovery denied when directed to substance of withheld documents at issue); Katzman, 926 F. Supp. at 319 (same); Curcio v. FBI, No. 89-941, slip op. at 3-4 (D.D.C. Mar. 6, 1990) (same); Moore v. FBI, No. 83-1541, slip op. at 6 (D.D.C. Mar. 9, 1984) (court denied discovery requests which "would have to go to the substance of the classified materials" at issue, noting that "[t]his is precisely the case when the court can and should exercise its discretion to deny that discovery"), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 56 (D.D.C. 1983) (objections to interrogatories sustained when answers would "serve to confirm or deny the authenticity of the document held by plaintiff"), aff'd, 772 F.2d 919 (D.C. Cir. 1984); cf. Indiana Coal Council v. Hodel, 118 F.R.D. 264, 265-66 (D.D.C. 1988) (discovery of legal research system barred as request for law, not factual information). But see Public Citizen v. EPA, No. 86-0316, slip op. at 7 (D.D.C. Oct. 16, 1986) ("While plaintiff has no right to material about deliberative processes, it at the least has a right . . . to know if the material it seeks justifies a deliberative process privilege.").

[305] Lederle Labs. v. HHS, No. 88-249, slip op. at 2-3 (D.D.C. May 2, 1988).

[306] See Cecola v. FBI, No. 94 C 4866, 1995 U.S. Dist. Ct. LEXIS 4011, at **8-9 (N.D. Ill. Mar. 31, 1995) (not allowing deposition concerning factual basis for assertion of Exemption 7(A), as "there is concern that the subject of the investigation not be alerted to the government's investigative strategy"); Williams v. FBI, No. 90-2299, slip op. at 7-8 (D.D.C. Aug. 6, 1991); Donohue v. United States Dep't of Justice, No. 84-3451, slip op. at 4 (D.D.C. May 16, 1986); see also Frydman v. Department of Justice, No. 78-4257, slip op. at 3-4 (D. Kan. Jan. 3, 1990) (discovery concerning electronic surveillance investigative practices denied).

[307] Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 4 (continued...)

LITIGATION CONSIDERATIONS

Discovery should be denied altogether if the court is satisfied from the agency's affidavits that no factual dispute remains,[308] and when the affidavits are "relatively detailed" and submitted in good faith.[309] Consequently, discovery should routinely be denied when the plaintiff's "efforts are made with [nothing] more than a `bare hope of falling upon something that might impugn the

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[307](...continued)
(D.D.C. Nov. 12, 1987) (discovery limited to determination of FOIA issues, not to underlying personnel decision); see also Immanuel v. Secretary of Treasury, No. CIV A. HAR 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995) (rejecting discovery which would constitute "a fishing expedition into all the possible funds held by the Department of Treasury which may fall within the terms of [plaintiff's] broad FOIA request. Such an expedition is certainly not going to come at the government's expense when it is evident that [plaintiff] seeks this information only for his own commercial use."), aff'd on other grounds, No. 95-1953, 1996 WL 157732 (4th Cir. Apr. 5, 1996); Morrison v. United States Dep't of Justice, No. 87-3394, slip op. at 4 (D.D.C. Apr. 29, 1988) (denying depositions and refusing to "sanction a fishing expedition" when plaintiff argued newspaper article evidenced waiver of Exemption 5, but article actually "raise[d] precisely the opposite inference").

[308] See Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), vacated in part & reh'g denied, 607 F.2d 367 (D.C. Cir. 1979); see also Becker, 34 F.3d at 406 (district court did not err by granting summary judgment to government without addressing plaintiff's motion for discovery; judge "must have been satisfied that discovery was unnecessary when she concluded that the IRS's search was reasonable and ruled in favor of the IRS on summary judgment"); Stone, No. 87-1346, slip op. at 2 (D.D.C. Jan. 19, 1988).

[309] See SafeCard Servs. v. SEC, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991) (affirming decision to deny discovery as to adequacy of search on ground that agency's affidavits were sufficiently detailed); Military Audit Project, 656 F.2d at 751 (affirming trial court's refusal to permit discovery when plaintiffs had failed to raise "substantial questions concerning the substantive content of the [defendants'] affidavits"); Hunt v. United States Marine Corps, 935 F. Supp. 46, 50 (D.D.C. 1996) (discovery denied when "defendants have met their burden of showing that they made a good faith effort to conduct a search for the requested records, using methods reasonably expected to produce the desired information"); Master v. FBI, 926 F. Supp. 193, 195-97 (D.D.C. 1996) (discovery denied when defendant's affidavit demonstrates it conducted an adequate search and released all nonexempt responsive material), summary affirmance granted, No. 96-5325, 1997 WL 369460, at *1 (D.C. Cir. June 2, 1997); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (discovery denied when "[p]laintiff has not offered any evidence to rebut the presumption of good faith that is accorded to [defendant's affidavit detailing its search]"); Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 n.3 (D.D.C. July 12, 1991) (plaintiff's "conjecture and unsupported allegation" that agency has "motive" to prevent release of responsive records held insufficient basis for discovery concerning adequacy of search); see also Gardels v. CIA, 689 F.2d 1100, 1106 & n.5 (D.C. Cir. 1982); Murphy, 490 F. Supp. at 1136-37.

affidavits'" submitted by the defendant agency.[310] In any event, "`curtailment of discovery' is particularly appropriate where the court makes an in camera inspection."[311]

Finally, it should be noted that in appropriate cases, the government can conduct discovery against the requester,[312] but there is no jurisdiction under the FOIA to permit either party to take discovery against a private citizen.[313]

Waiver of Exemptions in Litigation

As noted above, the FOIA directs district courts to review agency actions de novo.[314] Thus, an agency is not barred from invoking a particular exemption in litigation merely because that exemption was not cited in responding to the request at the administrative level.[315]

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[310] Center for Nat'l Sec. Studies, No. 91-1691, slip op. at 5 (D.D.C. Mar. 2, 1993) (quoting Founding Church of Scientology v. NSA, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979)); see Military Audit Project, 656 F.2d at 751-52.

[311] Ajluni v. FBI, 947 F. Supp. 599, 608 (N.D.N.Y. 1996) (quoting Katzman, 926 F. Supp. at 320); see Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (in camera review, rather than discovery, employed to resolve inconsistency between representations in Vaughn Index and agency's prior public statements); Laborers' Int'l, 772 F.2d at 921.

[312] See In re Engram, No. 91-1722, slip op. at 6-7 (4th Cir. June 2, 1992) (per curiam) (discovery regarding how plaintiff obtained defendant's document permitted as relevant to issue of waiver under Exemption 5); Weisberg v. United States Dep't of Justice, 749 F.2d 864, 868 (D.C. Cir. 1984).

[313] See Kurz-Kasch, Inc. v. DOD, 113 F.R.D. 147, 148 (S.D. Ohio 1986).

[314] 5 U.S.C. § 552(a)(4)(B) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[315] See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992); Frito-Lay v. EEOC, 964 F. Supp. 236, 239 (W.D. Ky. 1997) ("an agency's failure to raise an exemption at any level of the administrative process does not constitute a waiver of that defense"); Gula v. Meese, 699 F. Supp. 956, 959 n.2 (D.D.C. 1988); Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1370-71 (E.D.N.C. 1986); Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229, 1236 (N.D. Ill. 1982); Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision); see also Conoco Inc. v. United States Dep't of Justice, 521 F. Supp. 1301, 1306 (D. Del. 1981) (agency is not barred from asserting work-product claim under Exemption 5 merely because it had not acceded to plaintiff's demand for Vaughn Index at administrative level), aff'd in part, rev'd in part & remanded, 687 F.2d 724 (3d Cir. 1982). But cf. AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (in reverse FOIA context--when standard of review is "arbitrary [and] capricious" standard based

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LITIGATION CONSIDERATIONS

Failure to raise an exemption in a timely fashion in litigation at the district court level, however, may result in a waiver. Although an agency should not be required to plead its exemptions in its answer,[316] it has been held that "`agencies [may] not make new exemption claims to a district court after the judge has ruled in the other party's favor,' nor may they `wait until appeal to raise additional claims of exemption or additional rationales for the same claim.'"[317] Thus, an agency's failure to preserve its exemption claims can lead to serious waiver consequences as FOIA litigation progresses, not only during the initial district court proceedings,[318] but also at the appellate lev

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[315](...continued)
upon "whole" administrative record--agency may not initially offer at litigation stage its reasons for refusal to withhold material); Gilday v. United States Dep't of Justice, No. 85-292, slip op. at 5 (D.D.C. July 22, 1985) (agency rationale asserted in litigation over denial of fee waiver cannot correct shortcomings of administrative record).

[316] See, e.g., Frito-Lay, 964 F. Supp. at 239 ("According to the Sixth Circuit, there is no waiver of an affirmative defense not pleaded in the responsive pleading, as long as the opposing party has had sufficient notice of, and an opportunity to rebut the defense."); Johnson v. Federal Bureau of Prisons, No. 90-H-645-E, slip op. at 4-5 (N.D. Ala. Nov. 1, 1990); Farmworkers Legal Servs., 639 F. Supp. at 1371; Berry v. Department of Justice, 612 F. Supp. 45, 47 (D. Ariz. 1985); see also American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 206-07 (D.C. Cir. 1990). But see Ray v. United States Dep't of Justice, 908 F.2d 1549, 1557 (11th Cir. 1990) (going so far as to suggest that all exemptions must be raised by defendant agency "`in a responsive pleading'" (quoting Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982))), rev'd on other grounds sub nom. United States Dep't of State v. Ray, 502 U.S. 164 (1991); Maccaferri Gabions, Inc. v. United States Dep't of Justice, No. 95-2576, slip op. at 4-6 (D. Md. Mar. 26, 1996) (holding that government's withholding pursuant to FOIA exemption constitutes affirmative defense which must be set forth in answer, but finding that government's reference to exemption in its answer and requester's knowledge of basis for withholding cured any pleading defect), appeal voluntarily dismissed, No. 96-1513 (4th Cir. Sept. 19, 1996).

[317] Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting Holy Spirit Ass'n v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980), vacated in part as moot, 455 U.S. 997 (1982)). But cf. Steinberg v. United States Dep't of Justice, No. 93-2409, slip op. at 10 (D.D.C. July 14, 1997) (offering agency option of either further justifying withholding documents in full under Exemption 7(C) or invoking another exemption, such as Exemption 7(D)).

[318] See, e.g., Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 811 (9th Cir. 1995) (new exemption claims waived when raised for first time after district court ruled against government on its motion for summary judgment), petition for cert. dismissed, 116 S. Ct. 833 (1996); Ray, 908 F.2d at 1551 (same); Miller v. Sessions, No. 77-C-3331, slip op. at 2 (N.D. Ill. May 2, 1988) ("misunderstanding" on part of government counsel of court's order to submit additional affidavits
(continued...)

el,[319] and even following a remand.[320]

The effect of these holdings is somewhat mitigated by the Court of Appeals for the District of Columbia Circuit's observation in Jordan v. United States Department of Justice that if the government "through pure mistake" failed to assert the proper exemption in district court and the information involved was of a very sensitive nature and was "highly likely" to be protected by an exemption, then the appellate court would have discretion under 28 U.S.C. § 2106[321] to remand the case for such further proceedings "as may be just under the circumstances."[322]

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[318](...continued)
held insufficient to overcome waiver; motion for reconsideration denied); Nishnic v. United States Dep't of Justice, No. 86-2802, slip op. at 2-3 (D.D.C. Oct. 20, 1987) (defendant's motion for reconsideration to present additional affidavits, exemptions, and evidence under seal denied as defendant had "ample opportunity" to present all FOIA defenses at earlier stage of litigation); Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 4 (N.D. Cal. June 14, 1985) (government may not raise Exemption 7(D) for documents declassified during pendency of case when only Exemption 1 raised at outset).

[319] See, e.g., Jordan v. United States Dep't of Justice, 591 F.2d 753, 779-80 (D.C. Cir. 1978) (en banc) (refusing to consider government's Exemption 7 claim first raised in a "supplemental memorandum" filed one month prior to appellate oral argument).

[320] See, e.g., Fendler v. Parole Comm'n, 774 F.2d 975, 978 (9th Cir. 1985) (government barred from raising Exemption 5 on remand to protect presentence report because it was raised for first time on appeal); Ryan v. Department of Justice, 617 F.2d 781, 792 & n.38a (D.C. Cir. 1980) (government barred from invoking Exemption 6 on remand because it was raised for first time on appeal); see also Benavides v. United States Bureau of Prisons, 995 F.2d 269, 273 (D.C. Cir. 1993) ("[T]he government is not entitled to raise defenses to requests for information seriatim until it finds a theory that the court will accept, but must bring all its defenses at once before the district court.") (Privacy Act access case). Compare Washington Post Co. v. HHS, 795 F.2d 205, 208-09 (D.C. Cir. 1986) ("privilege" prong of Exemption 4 may not be raised for first time on remand--even though "confidential" prong was previously raised--absent sufficient extenuating circumstances), and Washington Post Co. v. HHS, 865 F.2d 320, 327 (D.C. Cir. 1989) (agency prohibited from raising new aspect of previously raised prong of Exemption 4), with Lame v. United States Dep't of Justice, 767 F.2d 66, 71 n.7 (3d Cir. 1985) (new exemptions may be raised on remand, as compared to raising new exemptions on appeal).

[321] (1994).

[322] 591 F.2d at 780; see Schanen v. United States Dep't of Justice, 798 F.2d 348, 349-50 (9th Cir. 1986) (although government's Rule 60(b) motion, based on procedural errors, was properly denied, government may withhold identities of
(continued...)

LITIGATION CONSIDERATIONS

Sometimes, changes in factual circumstances may dictate revisions of an agency's exemption position--for example, when an agency's Exemption 7(A) withholding is rendered moot by intervening factual developments.[323] Similarly, an agency should be able to belatedly assert new defenses if there is "an interim development in applicable legal doctrine."[324]

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[322](...continued)
informers and DEA agents due to possibility of imminent harm to those individuals; government subject to attorney fees, however); see also Oklahoma Publ'g Co. v. HUD, No. 87-1935-P, slip op. at 4 (W.D. Okla. June 17, 1988) (because Exemption 6 found applicable to material originally ordered disclosed, court held exemption not waived--to protect subject--but imposed sanctions on defendant and counsel); Washington Post Co. v. DOD, No. 84-2402, slip op. at 5 (D.D.C. Apr. 11, 1988) (permitting agency to raise new Exemption 1 claim for records previously found not protected by Exemption 5, when disclosure "could compromise the nation's foreign relations or national security" (citing Jordan, 591 F.2d at 780)); see also Ryan, 617 F.2d at 792 (following Jordan, rejects exemption not raised at district court level; no "extraordinary circumstances" warrant relief under 28 U.S.C. § 2106).

[323] See, e.g., Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982) (government not barred from invoking other exemptions after reliance on Exemption 7(A) rendered untenable by conclusion of underlying law enforcement proceeding); Donovan v. FBI, 625 F. Supp. 808, 809 (S.D.N.Y. 1986) (same); see also Senate of P.R., 823 F.2d at 581 (making no "broad pronouncement" on whether conclusion of law enforcement proceedings used to justify Exemption 7(A) claim will always be sufficient factual change, court found, based upon showing of good faith by agency, that trial judge did not abuse discretion in allowing agency to advance other exemptions); Curcio v. FBI, No. 89-0941, slip op. at 4-5 (D.D.C. Mar. 24, 1995) (in determining whether FBI can assert new exemptions in litigation based on termination of Exemption 7(A), court considers: "(1) whether the FBI has made a clear showing of what the changed circumstances are and how they justify permitting the agency to raise new claims of exemption, and (2) whether the FBI has now proffered a legitimate reason why it did not previously argue all applicable exemptions"); see also Church of Scientology v. IRS, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) ("If the investigation is open . . . at the time of the request, the documents are exempt. Furthermore, the agency is not required to monitor the investigation and release the documents once the investigation is closed and there is no reasonable possibility of future proceedings." (citing Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991))). But cf. Washington Post, 795 F.2d at 208 (fact that court recommended in previous decision, in dicta, that HHS raise new argument could not be considered "extraordinary circumstance" that would justify actually raising argument on remand).

[324] Jordan, 591 F.2d at 780; see also Cotner v. United States Parole Comm'n, 747 F.2d 1016, 1018-19 (5th Cir. 1984) (new exemptions may be asserted when remand due to "fundamental" change in government's position "not calculated to gain any tactical advantage in this particular case"); Carson v. United States Dep't
(continued...)

LITIGATION CONSIDERATIONS

In the district court, exemption claims should, of course, be substantiated by adequate Vaughn submissions. (See discussion under Litigation Considerations, "Vaughn Index," above.) Failure to submit an adequate Vaughn affidavit, however, should not result in a waiver of exemptions and justify the granting of summary judgment against an agency.[325] The most prudent practice for agency defendants, though, is to ensure that their initial Vaughn affidavits contain detailed justifications of every exemption planned to be asserted on the basis of all known facts.[326] By the same token, courts have held that they will not consider issues raised for the first time on appeal by FOIA plaintiffs.[327]

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[324](...continued)
of Justice, 631 F.2d 1008, 1015 n.29 (D.C. Cir. 1980) (declining to preclude consideration of particular FOIA exemptions on remand when, in holding that presentence report was agency record of Parole Commission for purposes of FOIA, court was "embark[ing] upon previously uncharted territory"). But see Lykins v. Rose, 608 F. Supp. 693, 695 (D.D.C. 1984) ("interim developments" justification for new exemptions does not include losses in instant case or rejection of alternative defense).

[325] See Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 982 (3d Cir. 1981) (abuse of discretion to refuse to consider revised index and instead award "partial judgment" to plaintiff, even though corrected index was submitted one day before oral argument on plaintiff's "partial judgment" motion); cf. Wilkinson v. FBI, No. 80-1048, slip op. at 3 (C.D. Cal. June 17, 1987) (after providing government 30 days to further justify exemptions, and after reviewing those subsequent declarations, court found same faults with new declarations as with original ones and ordered in camera review). But see Carroll v. IRS, No. 82-3524, slip op. at 28 (D.D.C. Jan. 31, 1986) (holding affidavits insufficient and affording agencies no further opportunities to reassert their claims; "[a]fter years of litigation, the suit must be resolved").

[326] See Coastal States, 644 F.2d at 981 (suggesting that agencies might be restricted to one index); see also ABC v. USIA, 599 F. Supp. 765, 768 (D.D.C. 1984) (flatly denying government's request to first litigate "agency record" issue and to raise other exemptions only if threshold defense fails).

[327] See, e.g., McCutchen v. HHS, 30 F.3d 183, 186-87 (D.C. Cir. 1994) (refusing to consider correctness of agency's interpretation of FOIA request when raised for first time on appeal); Curran v. Department of Justice, 813 F.2d 473, 477 (1st Cir. 1987) (in camera inspection of records not considered when raised for first time on appeal); Wightman v. ATF, 755 F.2d 979, 983 (1st Cir. 1985) (appointment of counsel not considered when raised for first time on appeal); Bush v. Webster, No. 85-4262, slip op. at 2-3 (5th Cir. Feb. 10, 1986) (government's lack of expeditious handling of case raised for first time on appeal); Kimberlin v. United States Dep't of the Treasury, 774 F.2d 204, 207 (7th Cir. 1985) (issue of deletions taken pursuant to FOIA exemptions raised for first time on appeal). But see Carter v. United States Dep't of Commerce, 830 F.2d 388, 390 n.8 (D.C. Cir. 1987) (appellate court sua sponte considered new theories of public interest in its Exemption 6 balancing not raised by plaintiff at district
(continued...)

LITIGATION CONSIDERATIONS

Attorney Fees and Litigation Costs

The FOIA is one of more than 100 different federal statutes which contains a "fee-shifting" provision permitting the trial court to award reasonable attorney fees and litigation costs if the plaintiff has "substantially prevailed" in

[327](...continued)
court); Farese v. United States Dep't of Justice, No. 86-5528, slip op. at 9-10 (D.C. Cir. Aug. 12, 1987) (plaintiff not estopped from challenging use of specific exemptions at appellate stage when he merely argued at trial court level that agency had failed to meet its burden of establishing documents exempt).